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No. 82-1261

In the Supreme Court of the United States

OCTOBER TERM, 1982

STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's violations of the National Labor Relations Act—which included a discriminatory discharge, threats of plant closure and numerous other unfair labor practices—precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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Statute:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 691 F.2d 1133. The decision and order of the National Labor Relations Board (Pet. App. A28-A107) are reported at 257 N.L.R.B. 304.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1982. A petition for rehearing was denied on December 23, 1982 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon finding that petitioner had committed a "plethora of acts of interference, restraint, and coercion against employees" (Pet. App. A32), including actions that would tend to destroy fair election conditions for a longer period of time than other unfair labor practices (*id.* at A32 n.7), the Board issued a bargaining order on the basis of authorization cards. Petitioner, while not disputing the Board's unfair labor practice findings, contends that the Board failed to offer an adequate explanation for its choice of remedies.

1. In February 1979,[1] the Amalgamated Clothing and Textile Workers Union, AFL-CIO ("the Union"), at the instance of several of petitioner's employees, began an organizing campaign among the employees at petitioner's Boaz, Alabama, plant (Pet. App. A2, A42). By February 20, 74 of petitioner's 147 employees had signed union authorization cards; by March 17, 13 more employees had signed cards (*id.* at A53 n.20). The Union then petitioned for a Board election and requested recognition from petitioner as the employees' exclusive bargaining representative. Petitioner refused to bargain with the Union (*id.* at A2, A43).

Meanwhile, shortly after the Union began its organizing activities, petitioner, through both its front-line supervisors and senior officials, embarked on a campaign of threats and coercive interrogations aimed at union supporters. On February 13, Supervisor Butch Harris summoned employee Kathy Holland to a private meeting in a locked room, interrogated her as to why she she wanted a union, and threatened that petitioner would close the plant if it went union (Pet. App. A12, A54-A55). Harris then held a similar meeting with employee Patricia Whisenant, interrogated her

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[1] All dates are in 1979, unless otherwise noted.

about the Union, threatened her with loss of access to management, and warned that petitioner "would close down the plant" in the event of unionization (*id.* at A12, A55-A56). At about the same time, Personnel Manager Ernest Bouldin told Whisenant that Holland would "get her ass fired" if she "d[id]n't watch" her involvement in the "Union business" (*id.* at A4, A63). A few weeks later, Whisenant confronted Bouldin after having been turned down for a job transfer and was told by him that he would "like her a lot better if she were on the right side" (*id.* at A4, A63-A64).

In late February, Supervisor Frank Lowery called employee Melinda Kennedy into his office, interrogated her about her union involvement, and asserted that, if the Union came in, petitioner would refuse to pay wages any higher than it currently paid (Pet. App. A10-A11, A69-A70). The next week, Lowery summoned union leader Betty Underwood to his office, issued her a verbal warning, and threatened that the existence of the union campaign would lead to unusually strict enforcement of petitioner's work rules (*id.* at A7, A71-A72).

In addition, petitioner suddenly commenced strict enforcement of a previously-dormant rule prohibiting employees from leaving their work stations without prior authorization; the evidence showed that petitioner reactivated the rule in order to prevent union supporters from getting signed authorization cards (Pet. App. A16-A19, A89-A92). On March 29 and April 9, union supporter Dennis Williams was issued warnings for minor violations of the rule; subsequently, petitioner gave Williams two more warnings for other minor infractions — warnings which would not have issued except for Williams' support of the Union. Petitioner, which had a policy of discharging employees after four formal warnings, then discharged

Williams on May 7 — 11 days before the scheduled representation election (*id.* at A19-A20, A92-A96).

On May 12, a few days after Williams' discharge, Supervisor Lowery chastized union activist Underwood for her concerted activities and added that, "if you'll notice, Dennis Williams raised hell for a couple of weeks, and he's not here any longer" (Pet. App. A6-A7, A75). At about the same time, Lowery approached employee Elizabeth Sharp, noted her friendship with Underwood, and interrogated her concerning her attitude toward the Union (*id.* at A9-A10, A73-A74). Shortly thereafter, Personnel Manager Bouldin interrogated Whisenant about her union sympathies (*id.* at A5, A66).

On May 18, the day of the election, Plant Superintendent Jack Bowman told union supporter Holland that petitioner had already decided that, if the Union won, petitioner would insist on certain contractual provisions that would not benefit the employees (Pet. App. A3-A4, A68-A69). The Union lost the election by a vote of 67 to 74 (*id.* at A2, A43). Three days later, Supervisor Harris berated Whisenant for the union supporters' decision to take the representation matter "to court," stating, "you're not satisfied getting in as deep as you have. You just go on and get in deeper and deeper" (*id.* at A13, A58).

The Union filed objections to the election and unfair labor practice charges with the Board, and the Board issued a complaint on the charges (Pet. App. A39, A43). Several months later, while preparing for the unfair labor practices hearing, one of petitioner's attorneys interrogated employee Willis Langston about his signed authorization card without advising Langston that he was free to decline to discuss the matter and that there would be no reprisal against him for anything he said concerning the matter (*id.* at A29-A31, A84-A87).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by threatening employees with plant closure, loss of access to management, discharge, bargaining intransigence, and other reprisals; by issuing retaliatory disciplinary warnings; by coercively interrogating employees; and by promising benefits (Pet. App. A29-A31, A99-A100). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by enforcing a previously dormant disciplinary rule, by issuing formal warnings to employees who violated the rule, and by discharging employee Williams because of his support for the Union (Pet. App. A100).

The Board also accepted the Administrative Law Judge's findings that petitioner's "conduct had 'the tendency to undermine [the Union's] majority strength and impede the election processes;' that the continuing impact of [petitioner's] coercive conduct renders a fair election unlikely, and that the authorization cards signed by [a majority of the unit] employees are a more reliable indication of their desire for representation" (Pet. App. A31, A98, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969)). Accordingly, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union (Pet. App. A31, A98). The Board explained that it reached this conclusion because "the serious and extensive unlawful activities by [petitioner] commenced immediately after the Union began its organization drive and continued unabated right up to the election and even after the election" (*id.* at A32). The Board noted that, during the three-month period between the advent of the Union and the election, petitioner violated Section 8(a)(1) of the Act by numerous instances of interrogation of employees about union activities, as well as by numerous threats of reprisals against employees because of their union

activities. The latter included the threat of plant closure, which "is among the most effective unfair labor practices for destroying election conditions for a longer period of time than other unfair labor practices" (Pet. App. A32 n.7). Petitioner further violated Section 8(a)(1) by making implied promises of benefits if employees would abandon the Union and threatening stricter enforcement of rules so long as the Union was on the scene. The Section 8(a)(1) violations continued even after the election, when petitioner threatened retaliation against an employee for continued union activity and engaged in another coercive interrogation (Pet. App. A32). Finally, the Board noted that petitioner violated Section 8(a)(3) of the Act by more "rigidly enforcing company work rules for the purpose of discouraging union activities," a policy which "contributed directly to the discriminatory discharge of union adherent Dennis Williams" and which was "the most effective way to short-circuit all * * * union activities" (Pet. App. A32-A33).

3. The court of appeals, with one judge dissenting, upheld the Board's decision and enforced its order (Pet. App. A1-A26).[2] The court held (*id.* at A22) that the bargaining order was "well within the Board's discretion" under the standards established in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). The court explained that (Pet. App. A22-A23):

> The Company responded to the Union's most recent campaign with threats of plant closure, threats of retaliation against Union activists, and discriminatory discipline aimed at thwarting unionization. As is widely

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[2]The court of appeals found, contrary to the Board, that one instance of interrogation by Supervisor Lowery was not coercive (Pet. App. A11). The court noted, however, that its rejection of that single finding had no impact on the propriety of the Board's remedial order (Pet. App. A23).

> recognized, such conduct tends "to have a lasting inhibitive effect" on employees' formulation and expression of free choice regarding unionization. NLRB v. Jamaica Towing, Inc., 632 F.2d [208,] 213 [2d Cir. 1980].

The court rejected petitioner's contention that the Board's rationale for issuing a bargaining order was inadequately explained. The court noted that "[i]n this case the Board discussed the particular violations involved and emphasized that 'the serious and extensive unlawful activities by [petitioner] commenced immediately after the Union began the organization drive and continued unabated right up to the election and even after the election' " (Pet. App. A22). The court concluded that "[t]his statement of reasons is sufficient to permit review * * *" (*ibid.*).

ARGUMENT

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 594 (1969), this Court sustained the Board's authority to issue bargaining orders in cases in which "serious unfair labor practices" have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." The Court approved the Board's issuance of bargaining orders not only in "exceptional" cases marked by "outrageous" unfair labor practices (Category I cases) (395 U.S. at 613-614), but also in cases where the unfair labor practices are "less pervasive," but the Board nevertheless finds "that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (Category II cases) (*id.* at 614-615). The Court also emphasized that (*id.* at 612 n.32):

> It is for the Board and not the courts * * * to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Petitioner no longer disputes the Board's unfair labor practice findings. Nor does it appear to challenge the conclusion that its unfair labor practices—which included threats and interrogations by the plant manager and personnel manager, as well as by front-line supervisors; two threats of plant closure; and the discharge of a union adherent for engaging in union activity—were the kind of serious violations which may warrant a bargaining order. Rather, petitioner contends (Pet. 6-7) that the Board's explication of the need for a bargaining order in this case does not meet the requirements of *Gissel* for the issuance of a Category II bargaining order.[3] There is no merit to petitioner's contention.

1. In concluding "that the continuing impact of [petitioner's] coercive conduct renders a fair election unlikely" (Pet. App. A31, A98), the Board carefully considered not only the extent of the unfair labor practices and their past

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[3]Petitioner does not contend that there is any conflict among the circuits over the proposition that unfair labor practices of the scope and nature involved here represent the kind of violations that constitute a *Gissel* Category II case. Indeed, the courts of appeals have consistently held that unlawful discharges and threats of plant closure are sufficient to justify a Category II bargaining order. See, *e.g.*, *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir. 1981); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981); *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1150-1151 (9th Cir. 1977); *NLRB* v. *Lou De Young's Market Basket, Inc.*, 430 F.2d 912, 915 (6th Cir. 1970).

effect on the election process, but also their continuing effect. Thus, the Board found that the Union represented a majority of petitioner's employees when it requested and was refused recognition by petitioner, and that petitioner committed "serious and extensive" violations of the Act in an antiunion campaign that "commenced immediately after the Union began its organization drive and continued unabated right up to the election and even after the election" (*id.* at A31-A32). The Board noted that not only were there "numerous" instances of coercive interrogations and unlawful threats, including plant closure, but that "the threat of plant closure is among the most effective unfair labor practices for destroying election conditions for a longer period of time than other unfair labor practices" (*id.* at A32 n.7, citing *Gissel, supra,* 395 U.S. at 611 n.31). The Board further noted that petitioner made promises of benefits conditioned on abandonment of support for the Union, threatened the employees with more rigid enforcement of work rules because of the existence of union activities, and then implemented this more rigid enforcement policy, which "contributed directly to the discriminatory discharge of union adherent Dennis Williams" (Pet. App. A32-A33). Finally, the Board noted that petitioner's unlawful activity continued even after the election (*id.* at A32).

Without doubt, these findings plainly are sufficient to meet the requirement of *Gissel* that, in a Category II situation, the Board must determine that "the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" than an election (395 U.S. at 614-615). Contrary to petitioner's apparent contention (Pet. 7), the Court in *Gissel* did not impose any rigid analytic framework on the Board; indeed the Court noted that the requisite findings

were probably implicit in the Board's decisions to issue bargaining orders (395 U.S. at 613). The Court remanded three of the four cases under review for additional findings only because both the Board and the Court discarded the Board's prior practice of requiring the Board "to phrase its findings in terms of an employer's good or bad faith doubts [concerning the union's majority status]" (395 U.S. at 616). No such extraneous findings infected the Board's decision in the instant case, and it is thus fully consistent with *Gissel*.

2. Petitioner contends (Pet. 11) that the decision here conflicts with decisions in the First, Sixth, Seventh, Ninth and Tenth Circuits.[4] But the asserted conflict among the circuits has nothing to do with the circumstances in which it is appropriate for the Board to issue bargaining orders; the governing principles were established in *Gissel*, and the courts of appeals have generally followed them. Instead, petitioner contends that the courts are in conflict over the degree of factual analysis that is required for meaningful judicial review. Upon examination, it is apparent that petitioner's assertion of a conflict reflects nothing more than the fact that in some cases the courts have criticized the Board's explanation of its decision to issue a bargaining order as being too sketchy to permit meaningful judicial review,[5]

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[4]Petitioner concedes (Pet. 10) that the court of appeals' opinion is "consistent with decisions in the Second, Third, Fifth, and Eighth Circuits."

[5]See, *e.g.*, *NLRB* v. *American Spring Bed Mfg. Co.*, 670 F.2d. 1236, 1247-1248 (1st Cir. 1982); *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1979); *NLRB* v. *Rexair, Inc.*, 646 F.2d 249, 251 (6th Cir. 1981); *NLRB* v. *Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982); *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F.2d 503, 508-511 (7th Cir. 1980); *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108, 1118-1119 (7th Cir. 1973); *NLRB* v. *Miller Trucking Service, Inc.*, 445 F.2d 927, 931-932 (10th Cir. 1971). Significantly, in many of these cases the courts refused to enforce Board bargaining orders not only because of a perceived insufficiency in the Board's stated rationale,

while in other cases the courts have found the Board's explanation sufficient (see page 10 note 4, *supra*). Significantly, all of the circuits that petitioner asserts are in conflict with the Fourth Circuit have enforced Board bargaining orders supported by findings similar to the Board's findings in this case.[6] It is thus apparent that no significant legal conflict exists; instead, the cases cited by petitioner demonstrate only that different factual circumstances will produce different results. Such an unremarkable phenomenon does not warrant this Court's review.[7]

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but because the Board's unfair labor practice findings were either set aside or found not to be of sufficient magnitude to warrant bargaining orders. See, *e.g.*, *American Spring Bed, supra*, 670 F.2d at 1248; *Pilgrim Foods, supra*, 591 F.2d at 120; *Century Moving & Storage, Inc., supra*, 683 F.2d at 1094; *Red Oaks Nursing Home, Inc., supra*, 633 F.2d at 510-511; *Peerless of America, Inc., supra*, 484 F.2d at 1120-1122.

[6]See, *e.g.*, *NLRB* v. *Hasbro Industries, Inc.*, 672 F.2d 978, 989-990 (1st Cir. 1982), enforcing 254 N.L.R.B. 587, 594-595 (1981); *NLRB* v. *Matouk Industries, Inc.*, 582 F.2d 125, 130 (1st Cir. 1978); *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664-665 (6th Cir. 1982); *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir.), enforcing 253 N.L.R.B. 1054, 1084-1085 (1981); *NLRB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 693-694 (7th Cir. 1982), enforcing 253 N.L.R.B. 5, 14 (1980); *NLRB* v. *Davis*, 642 F.2d 350, 354-356 (9th Cir. 1981), enforcing 243 N.L.R.B. 837, 845 (1979); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1152 (9th Cir. 1977), enforcing 201 N.L.R.B. 647, 657 (1973); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981), enforcing 244 N.L.R.B. 303, 315 (1979).

[7]Petitioner also asserts (Pet. 13-14) that the Fourth Circuit's decision in this case conflicts with its decisions in *NLRB* v. *Appletree Chevrolet, Inc.*, 608 F.2d 988, 998-999 (1979), on remand, 671 F.2d 838, 841 (1982), and *NLRB* v. *Maidsville Coal Co.*, No. 81-2155 (Nov. 15, 1982), rehearing en banc granted (Feb. 16, 1983). An intra-circuit conflict does not warrant review by this Court because it can, and should, be resolved by the court of appeals sitting en banc. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Indeed, the Fourth Circuit has undertaken to resolve any such conflict by granting the Board's petition for rehearing en banc in *Maidsville*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT A. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney

National Labor Relations Board

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